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by ELI H. GLOVINSKY*

I
Introduction

Historically, federal regulation of television has been marked by complexity and confusion. This fact is, perhaps, nowhere more apparent than in the current issues and controversy surrounding the "tentative" repeal of the financial interest and syndication rules by the Federal Communications Commission (FCC). The rules, which were promulgated by the FCC in 1970, effectively prohibit the "big three" television networks[1]

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1. The three major networks, the American Broadcasting Company (ABC), the National Broadcasting Company (NBC), and the Columbia Broadcasting System (CBS), are, in essence, distribution companies. They distribute television programs over telephone lines and via satellite to individual affiliated stations. In addition, each network owns and operates several stations in major markets. Networks obtain their revenue from advertisers who pay a certain rate to have commercials broadcast. W. JONES, CASES AND MATERIALS ON ELECTRONIC MASS MEDIA 146-48 (2d ed. 1979). Other privately owned stations can contract with one of the major networks in order to receive that particular network's programming and thus become a network affiliate. As an affiliate, a local station can choose not to exhibit network programs, yet affiliates typically air 95% of the networks' offerings because first, they receive

> direct compensation from the network equal to approximately 30% of the station's advertising rate (fixed by negotiation between the station and the network) after carrying approximately 20 to 25 hours of network programming each month without compensation. Second, the station can sell advertising time at the "station breaks" to non-network advertisers; the value of this time is enhanced by the popularity of the network's programming. Third, if the network's programs attract large audiences, there may be a tendency for such audiences to remain tuned to the station for non-network programming or to identify the station as one which generally carries popular programming; this enhances the audiences and advertising rates for the station's non-network programs.

Id. at 147.

Independent stations are those that are not owned by, or affiliated with, a major network. Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 440 (C.D. Cal. 1979).

from either acquiring financial interests in independently produced programs or participating in the lucrative after-market of syndicated network entertainment series.[2]

The involvement of two powerful groups, one opposing repeal, the other advocating it, has intensified the controversy. In one corner are the networks, who see repeal as an opportunity to share in the profits from syndication.[3] Opposing the networks is the Committee for Prudent Deregulation (CPD), a coalition of independent producers, independent television stations, television performers, program directors, writers, syndicators, and distributors[4] favoring retention of the rules which have helped them to prosper.[5]

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2. The financial interest rule provides that no network shall:

> acquire any financial or proprietary right or interest in the exhibition, distribution, or other commercial use of any television program produced wholly or in part by a person other than such television network, except the license or other exclusive right to network exhibition within the United States and on foreign stations regularly included within such television network.

47 C.F.R. § 73.658(j)(1)(ii) (1983).

The syndication rule provides that no network shall:

> sell, license, or distribute television programs to television station licensees within the United States for non-network television exhibition or otherwise engage in the business commonly known as "syndication" within the United States; or sell, license, or distribute television programs of which it is not the sole producer for exhibition outside the United States; or reserve any option or right to share in revenues or profits in connection with such domestic and/or foreign sale, license, or distribution.

47 C.F.R. § 73.658(j)(1)(i) (1983).

3. The syndication market has been estimated to be worth from $800 million to $1.2 billion a year. Shaw, *Networks, Hollywood Battle Over Rights*, The Record, Oct. 25, 1983, at 10, col. 3.

4. *In re* Amendment of 47 C.F.R. § 73.658(j), The Syndication and Financial Interest Rule, Comments of the Committee for Prudent Deregulation in BC Docket No. 82-345, at 1 (Jan. 26, 1983) [hereinafter cited as CPD Comments]. Prominent members of the CPD include Norman Lear's Embassy/Tandem Productions, MTM Enterprises, Cox Communications, and Lorimar Productions.

5. The networks rarely produce entertainment series. This fact is, in part, a result of their respective consent decrees with the Department of Justice which allow them to produce only a limited number of programs through their own "in-house" production resources. *See, e.g., infra* note 55 and accompanying text.

Thus, the vast majority of entertainment series are produced by independent production companies such as MTM or film studios such as Twentieth Century Fox. Independent producers, under the rules, own financial and syndication rights to the programs they produce. Ownership of syndication rights allows independent producers to profit from the sale of exhibition rights after the program's network run. The networks, while often overseeing the development process of a series from concept to the one-time production of a trial episode (a pilot), pay producers a set license fee in exchange for the exclusive right to exhibit the program a certain number of times. The networks' ownership interest is limited to such exclusive exhibition rights. Producers contend that network license fees typically do not cover the cost of production. Thus, The debate over the proposed repeal of the financial interest and syndication rules has given rise to a variety of issues which, under close analysis, present four striking paradoxes. First, although the FCC's underlying policy goal throughout its regulatory history has been to encourage diversity, its initial allocation of the television spectrum in 1952 virtually guaranteed the development of only three successful commercial television networks.[6] Second, the networks, while contending that competition from new video technologies such as cable television has eroded their share of the television viewing audience, at the same time admit that their dominant position will remain secure into the 1990's.[7] If such admissions are true, deregulation, which in this instance means repeal of the rules, would achieve a contradictory result as far as the FCC policy goal of diversity is concerned. In short, repeal might help the networks to solidify their control over the television industry by weakening the financial and political clout of independent producers, an existing check on network power.

The third paradox is evident in the networks' reaction to competition from new video sources. Although the networks claim that this competition justifies repeal of the rules, they are, in fact, major investors in such new sources.[8] In essence, the networks' appeal can be viewed as a cry to "save them from themselves."[9]

Finally, under the banner of deregulation, the FCC's current chairman, Mark S. Fowler, is the driving force behind the movement to repeal the rules.[10] Yet President Reagan, who appointed Fowler and consistently espouses the values of gov-

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they rely on the profits from syndication in order to remain financially strong. Amendment of Syndication and Financial Interest Rules, Tentative Decision and Request for Further Comments in BC Docket No. 82-345, FCC 83-377, 48 Fed. Reg. 38,020, paras. 2-6 (adopted Aug. 4, 1983) [hereinafter cited as Tentative Decision]. *See also* 2 FCC NETWORK INQUIRY SPECIAL STAFF, BACKGROUND REPORTS TO: NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION 319-439 (1980) [hereinafter cited as BACKGROUND REPORTS].

6. BACKGROUND REPORTS, *supra* note 5, at 74.

7. Amendment of the Commission's Syndication and Financial Interest Rule, Notice of Proposed Rule Making in BC Docket No. 82-345, FCC 82-300, 47 Fed. Reg. 32,959, 32,967 (adopted June 23, 1982) [hereinafter cited as Notice of Proposed Rule Making].

8. *In re* Amendment of 47 C.F.R. § 73.658(j), The Syndication and Financial Interest Rule, Reply Comments of the Committee for Prudent Deregulation in BC Docket No. 82-435, at 29 (Apr. 26, 1983) [hereinafter cited as CPD Reply Comments].

9. CPD Comments, *supra* note 4, at 156.

10. *Networks Win Financial Interest, Syndication Battle*, BROADCASTING, Aug. 8, 1983, at 28.

ernment nonintervention, has advocated retention of the rules for at least two more years.[11]

This note analyzes the apparent irony surrounding the tentative repeal of the rules and attempts to demonstrate that repeal at the present time would achieve an unintended result: a less diverse television industry. Since it is important to understand the historical context underlying the present controversy, this note begins with a discussion of the development of FCC policy leading to the adoption of the rules in question. It then focuses on the current marketplace and the impact of new entertainment and information media. Based on the current video marketplace and future projections, the note concludes by suggesting that, in the absence of a viable network/producer compromise concerning financial and syndication rights, the present rules should be left intact.

II
Historical Background

A. The Policy of Diversity

Section 151 of the Communications Act of 1934 established the FCC as a federal agency and empowered it to enforce other provisions of the Act.[12] The operative language most often cited as defining standards for FCC regulation provides that the Commission must promote the standard of "public convenience, interest, or necessity."[13] One commentator points out that the exact parameters of "public interest" were left intentionally undefined to allow the standard to be applied flexibly to changing circumstances.[14] The FCC recognizes, however, that the public interest standard is most effectively advanced if regulation is based on a policy of encouraging diversity and competition.[15] In the Commission's view, the public interest standard embodies two basic principles: "(1) promoting the diversification of programming sources and viewpoints (diversity) and (2) encouraging competition in broadcasting (economic efficiency)."[16] In effect, "[d]iversity has been the

11. *Ganging Up on the Networks Re Fin-Syn*, BROADCASTING, Nov. 7, 1983, at 31.
12. 47 U.S.C. § 151 (1976).
13. *Id.* § 303.
14. S. PERLMAN, LEGAL ASPECTS OF SELECTED ISSUES IN TELECOMMUNICATIONS 4 (1970).
15. Tentative Decision, *supra* note 5, at para. 102.
16. CPD Comments, *supra* note 4, at 84.

lynchpin of many Commission actions for nearly fifty years."[17]

The United States Supreme Court, based on its interpretation of the Act, has recognized the expansive power of the FCC to advance the public interest through policies designed to achieve a competitive and diverse marketplace.[18] Furthermore, in many other areas of economic regulation the Court itself has encouraged diversity and competition. For example, in a landmark antitrust decision, *Northern Pacific Railway Co. v. United States*,[19] the Court reaffirmed its belief in the value of a competitive and diverse marketplace. The Court cited this policy as deriving from "the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[20]

B. Spectrum Allocation

In 1945, the FCC grappled with the question of how to allocate the available frequency spectrum,[21] taking into account the recent emergence of television.[22] An important consideration was whether to assign stations to the ultra high frequency (UHF)[23] spectrum or the very high frequency (VHF)[24] spectrum.[25] Radio Corporation of American (RCA) had developed a television receiver designed to receive VHF signals and thus pressed the Commission to assign the VHF spectrum.[26] Co-

17. *Id.*
18. National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943).
19. 356 U.S. 1 (1958).
20. *Id.* at 4.
21. Most of the frequency spectrum is invisible. It encompasses light, sound, and radio waves. Such waves are disturbances which travel through space like the ripples created by a raindrop in a still pond. Waves are classified by the distance from crest to crest (wavelength) and the number of these crests which occur per second (cycles per second). The portion of the spectrum reserved for broadcast television includes the very high frequency (VHF) spectrum, found between 54 and 300 million cycles per second (megahertz or MHz), and the ultra high frequency (UHF) spectrum, located between 470 and 806 MHz. The VHF band includes television channels 2-13 while UHF includes channels 14-69. It is important to recognize that the spectrum is a finite natural resource with limited capacity. Lachenbruch, *A Field Guide to the Airwaves*, CHANNELS FIELD GUIDE '84, 1983, at 47.
22. BACKGROUND REPORTS, *supra* note 5, at 69.
23. *See supra* note 21.
24. *Id.*
25. BACKGROUND REPORTS, *supra* note 5, at 69-70.
26. *Id.* at 69.

lumbia Broadcasting System (CBS), on the other hand, urged allocation of the UHF spectrum because CBS Laboratories had developed a color receiver which operated only on UHF.[27] The FCC struck what it saw as a compromise and in its initial allocation assigned frequencies from the VHF spectrum, while at the same time determined that television would ultimately use the UHF band because it provided more room for expansion.[28]

In 1952, the FCC finalized its frequency assignments in its *Sixth Report and Order*.[29] This final allocation insured the initial development of only two networks, the National Broadcasting Company (NBC) and CBS.[30] According to the CPD:

> This result was ordained by the combination of (1) the economic fact that a successful national television network needed access to at least the 50 largest cities in the country; (2) the technical fact that the development of VHF television was far ahead of UHF both in terms of transmission equipment and numbers of receivers possessed by consumers; and (3) the regulatory fact that the *Sixth Report* had assigned more than two VHF outlets in only 27 of the top 50 markets.[31]

Another important factor contributing to the initial preeminence of only two networks was that the two major radio networks, NBC and CBS, were able to extend their radio networks into the television medium.[32] During the late 1930's, the two radio networks, using their networking experience, began plans for expansion into television.[33] Later, as television stations went on the air, network radio affiliates often became television affiliates, network radio programs were transformed into television programs, and radio advertisers began advertising on television.[34]

In a sense, the *Sixth Report* represents a regulatory paradox. The FCC's allocation under the *Sixth Report* directly contra-

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27. *Id.* at 70.

28. *Id. See also* STERLING & KITTROSS, STAY TUNED: A CONCISE HISTORY OF AMERICAN BROADCASTING 233 (1978).

29. Television Assignments, Sixth Report and Order, 41 F.C.C. 148 (1952).

30. BACKGROUND REPORTS, *supra* note 5, at 74. ABC, although involved in the development of television networking, experienced great financial difficulties in its early years. The 1952 spectrum allocation impaired ABC's ability to acquire new advertisers and affiliates. Thus, "[i]t took ABC television 25 years to reach competitive parity with NBC and CBS." *Id.* at 88.

31. CPD Comments, *supra* note 4, at 10.

32. BACKGROUND REPORTS, *supra* note 5, at 75.

33. *Id.*

34. *Id.*

dicted the Commission's long sought goal of diversity by assuring the initial emergence of only two national networks. During the next thirty years, the FCC would attempt to rectify many of the problems created by its 1952 allocation.

C. Subsequent Regulation

1. *FCC*

As early as 1938, the Commission began investigating possible regulatory schemes for radio networks.[35] Some of these schemes, although first applied to radio, were later extended to television.[36] During the late 1950's, Congress and the Department of Justice supplemented the work of the FCC by conducting additional investigations into the rapidly emerging television industry.[37]

The present financial interest and syndication rules had their beginnings in a 1959 FCC *Order for an Investigatory Proceeding (Order)*.[38] The proceeding was designed to inquire into various aspects of television programming including own-

35. CPD Comments, *supra* note 4, at 12.

36. *Id.* at 13.

37. In 1956, the Senate Committee on Interstate and Foreign Commerce, after holding hearings on issues pertinent to the television industry, concluded:

> There can be no doubt . . . that the networks occupy such a key position by virtue of their control over the best time in the key markets, that they have the power either to exclude independently produced programs from their schedules, thus making way for their own programs, or to give such programs access to network time only in return for the granting of an interest in the independent programs.

CPD Comments, *supra* note 4, at 19 (quoting STAFF OF SENATE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 85TH CONG., 1ST SESS., REPORT ON TELEVISION NETWORK PRACTICES 66 (Comm. Print 1957)).

The House Antitrust Subcommittee reached similar conclusions. As a result, several bills were introduced "to provide for various levels of network regulation." CPD Comments, *supra* note 4, at 20. In 1956, the Department of Justice also began an investigation into network television, focusing on possible antitrust violations by the networks. *Id.* at 21.

38. In Docket No. 12782, 24 Fed. Reg. 1605 (adopted Feb. 26, 1959). A 1957 FCC document called *The Barrow Report* culminated an earlier inquiry into network television. The 1957 report "established the relationship between the networks' control of station broadcasting time and the inability of independent producers to supply programming in competition with that owned or produced by the networks." CPD Comments, *supra* note 4, at 14. Soon after *The Barrow Report* was released, the FCC also established the Office of Network Study, which, in 1962, concluded in its *Second Interim Report* that "the high hopes . . . that 'competition' would decentralize the 'tremendous power' of networks over what the public may see or hear has not, as yet, been realized in television network operations." *Id.* at 16 (quoting FCC OFFICE OF NETWORK STUDY, TELEVISION NETWORK PROGRAM PROCUREMENT (1962), *reprinted in* H.R. REP. NO. 281, 88th Cong., 1st Sess. 3-10 (1963)).

ership, production, acquisition, distribution, selection, sale, and licensing.[39] It focused on the extent to which the networks controlled programming.[40] Based on the information gathered during the investigation prompted by the 1959 *Order*, the Commission, in its 1965 *Notice of Proposed Rule Making (Notice)*, outlined certain rules, including the present financial interest and syndication rules, which were "designed to correct a perceived competitive imbalance in program production and distribution industries."[41] The Commission determined that the networks had

> adopted and pursued practices in television program procurement and production through which they have progressively achieved virtual domination of television program markets. The result is that the three national network corporations not only in large measure determine what the American people may see or hear during the hours when most Americans view television but also would appear to have unnecessarily and unduly foreclosed access to other sources of programs.[42]

The FCC also determined that the networks often required producers to cede valuable syndication and financial interest rights as a condition of exhibition.[43] The Commission concluded that undue control by networks over programming was undesirable because "diversification of economic interest and power in this area is a cardinal principle of the public interest standard of the Communications Act."[44]

As a result of the concerns expressed in the 1965 *Notice*, the FCC adopted the financial interest and syndication rules in 1970.[45] The Commission asserted that "[t]he public interest re-

39. Order for an Investigatory Proceeding in Docket No. 12782, 24 Fed. Reg. 1605 (adopted Feb. 26, 1959).

40. *Id.*

41. Tentative Decision, *supra* note 5, at para. 15 (citing Notice of Proposed Rule Making, 45 F.C.C. 2146 (1965)).

42. *In re* Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting, Notice of Proposed Rule Making, 45 F.C.C. 2146, para. 4 (1965).

43. *Id.* at para. 25.

44. *Id.*

45. *In re* Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting, Report and Order, 23 F.C.C.2d 382 (1970). The Prime Time Access Rule, which was adopted at the same time as the financial interest and syndication rules but is not included in the tentative repeal, prohibits television stations from exhibiting more than three hours of network and off-network programs (network re-runs) during the 7:00-11:00 p.m. prime time period. *Id.* at para. 5.

quires limitation on network control and an increase in the opportunity for development of truly independent sources of prime time programming."[46] In a *Memorandum Opinion and Order* affirming the rules, the FCC explained:

> [T]he principal purposes of our new syndication rules are two: (1) to lessen the bargaining leverage provided by network control of program exhibition on most stations throughout the country which enables networks successfully to bargain for subsidiary rights and interests with producers, and (2) to remove the possibility that acquisition of such rights becomes a prerequisite to acceptance of a program for network exhibition.[47]

Based on the contention that they violated free speech and the first amendment, the rules were challenged unsuccessfully in *Mt. Mansfield Television, Inc. v. FCC*.[48] Quoting the landmark decision of *Red Lion Broadcasting, Inc. v. FCC*,[49] the court in *Mt. Mansfield* asserted that "the First Amendment confers no right on licensees . . . to an unconditional monopoly of a scarce resource which the Government has denied others the right to use."[50] The *Mt. Mansfield* court also reaffirmed the Commission's expansive powers to regulate in the public interest.[51]

2. *Department of Justice*

Other administrative agencies in addition to the FCC became interested in network practices. In 1972, after several years of investigation of possible network violations of the Sherman Antitrust Act, the Department of Justice filed antitrust suits against each of the three networks.[52] In its suit against NBC, the Justice Department alleged that the network, along with CBS and the American Broadcasting Company (ABC), was attempting to acquire a monopoly over the televi-

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46. *Id.* at para. 22.

47. *In re* Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting, Memorandum Opinion and Order, 25 F.C.C.2d 318, para. 29 (1970).

48. 442 F.2d 470 (2d Cir. 1971).

49. 395 U.S. 367 (1969).

50. *Mt. Mansfield*, 442 F.2d at 447 (quoting *Red Lion*, 395 U.S. at 391).

51. *Id.* at 480.

52. The suits were dismissed on procedural grounds but were refiled in 1974. CPD Comments, *supra* note 4, at 31.

sion programming market.[53] Such actions, the Justice Department claimed, concentrated ownership and control of prime time television programs and unreasonably restrained the production, distribution, and sale of television programs. It concluded that "the viewing public has been deprived of the benefit of free and open competition in the broadcasting of television entertainment programs."[54]

NBC was the first network to settle the antitrust suit brought by the Justice Department. The network agreed to abide by a consent decree designed to restrict many of its alleged antitrust violations. Among the provisions of the consent decree, effective until 1990, are financial interest and syndication rules virtually identical to the 1970 FCC rules, a limitation on internal, in-house production by the network,[55] and a variety of other restrictions dealing with everything from options to exclusivity rights.[56]

Interestingly enough, only the court appeared satisfied with the NBC consent decree. Both independent producers and the networks objected to its terms.[57] The producers claimed that the networks should not be allowed any in-house production of programs, claiming that the networks could threaten expansion of such internal production in order to acquire more favorable terms in their dealings with independent producers.[58] The networks argued that the decree was anti-competitive because it would shield independent producers from competition by the networks as program producers.[59]

Although NBC entered into its consent decree in 1973, CBS and ABC did not agree to similar decrees until 1980.[60] CBS and ABC obtained what they considered to be important modifications of the original NBC decree before they would agree to settle. Because of a "favored-nations" clause in the NBC and

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53. United States v. National Broadcasting Co., 449 F. Supp. 1127, 1130 (C.D. Cal. 1978).

54. *Id.* at 1130-31.

55. The decree allowed NBC to produce 2.5 hours of in-house programming per week. *Id.* at 1131.

56. *Id.* at 1131-34.

57. *Id.* at 1138-40.

58. *Id.* at 1135-38.

59. *Id.* at 1138-40.

60. United States v. Columbia Broadcasting Sys., Civ. No. 74-3599-RJK (C.D. Cal. July 3, 1980), *reprinted in* 45 Fed. Reg. 34,463 (1980); United States v. American Broadcasting Co., Civ. No. 74-3600-RJK (C.D. Cal. Nov. 14, 1980), *reprinted in* 45 Fed. Reg. 58,441 (1980).

CBS decrees which allowed the modifications acquired by each network to apply to the others as well, the "improvements" in the decrees negotiated by ABC and CBS were embodied in the decrees of all three networks.[61]

D. Reconsideration of the Rules

In 1977, the FCC began its most recent inquiry into network television.[62] This inquiry focused primarily on the relationships between the networks and their affiliate stations and on whether the affiliates' programming discretion was under the control of the networks.[63] The investigation also considered the issue of whether the networks, despite the previous action of the FCC and Department of Justice, had continued to maintain anti-competitive policies.[64]

The inquiry was prompted, in part, by a petition submitted to the Commission by Westinghouse Broadcasting Company calling for a "comprehensive inquiry and rulemaking proceeding to review the changing role and function of the three national television networks."[65] The antitrust cases filed against the networks also played a role in the decision to begin another study.[66]

In its 1978 *Further Notice of Inquiry*, the FCC stated that it was "centrally concerned about whether . . . [certain network] practices enable the existing major commercial networks, in their relations with affiliates and program suppliers, to limit the opportunities for others to compete for station broadcast time and thereby exert an anti-competitive influence upon the

61. The NBC decree permitted the network to acquire and exercise the option to reorder a series for a maximum of five years. CBS agreed to an "improved" provision which allowed it to acquire and exercise such options for only four years but allowed future options to be acquired after the initial network/producer agreement expired. The ABC decree permitted a graduated increase in internal production during the second five years of the 10-year restriction from 2.5 hours per week (the NBC decree limit) to five hours per week. 2 Comments of CBS, Inc. app. B, 8-9 (Jan. 26, 1983) [hereinafter cited as CBS Comments].

62. *In re* Commercial Television Network Practices and the Ability of Station Licensees to Serve the Public Interest, Notice of Inquiry, 62 F.C.C.2d 548 (1977) [hereinafter cited as Notice of Inquiry].

63. *Id.* at para. 2.

64. *Id.* at para. 3.

65. *Id.* at para. 4 (citing Westinghouse, Inc. Petition for Rule Making in Docket No. RM-2749, 1, (Sept. 3, 1976)).

66. *Id.*

industry's behavior."[67] The Commission also considered possible structural remedies which might alleviate problems created by the three-network system.[68]

1. *Network Inquiry Special Staff Report*

In 1980, the Network Inquiry Special Staff, which was created in response to the 1977 *Notice of Inquiry*,[69] released its final report.[70] Although the FCC considers the recommendations of the Staff as merely advisory, the Staff's Final Report was perhaps the most influential factor underlying the Commission's tentative repeal of the rules.[71]

Many of the Staff's initial findings directly contradicted the FCC's assumptions that justified the financial interest and syndication rules.[72] For example, the Staff contended that the market for syndicated programs was competitive before the rules were imposed.[73] Thus the networks did not, in its view, operate anti-competitively by taking advantage of financial interest or syndication rights they had acquired. The Staff also explained that the rules might interfere with "an efficient risk-sharing arrangement between the networks and their program supplies."[74] This argument, which was also emphasized by the networks in their lobbying campaign against the rules,[75] is based on the assumption that, if the networks are permitted to

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67. *In re* Commercial Television Network Practices, Further Notice of Inquiry, 69 F.C.C.2d 1524, para. 18 (1978).

68. *Id.* at para. 21.

69. *See* Notice of Inquiry, *supra* note 62.

70. FCC NETWORK INQUIRY SPECIAL STAFF, FINAL REPORT: NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION (1980) [hereinafter cited as FINAL REPORT].

71. "The Commission has never expressly endorsed or rejected the conclusions or recommendations of the Network Inquiry Special Staff. However, having noted the staff's conclusions . . . we instituted the present rule making proceeding . . . ." Tentative Decision, *supra* note 5, at para. 22.

72. FINAL REPORT, *supra* note 70, at IV-79. *See also* BACKGROUND REPORTS, *supra* note 5, at 784-95.

73. Tentative Decision, *supra* note 5, at para. 21. The CPD contends that the networks did not take advantage of their ability to negotiate for financial or syndication rights because the marketplace prior to adoption of the rules was significantly different from that which exists today. Specifically, very few independent stations were in operation at the time. Thus the value of off-network programs and the competitive impact of the independents on the networks were minimal. The CPD asserts that, as a result, the networks had little motivation to become involved in syndication. CPD Comments, *supra* note 4, at 126-28.

74. Tentative Decision, *supra* note 5, at para. 21.

75. *See* CBS Comments, *supra* note 61, at 122-32.

acquire financial interests and syndication rights in programs, they will share the great financial risks involved in program production. Under the rules, these risks are shouldered almost entirely by the independent producers.[76] As a result of the risks which must be borne by independent producers, the Staff asserted that the program production industry has become concentrated in the hands of a few large independent producers and studios.[77]

Among the Staff's conclusions was its assertion that the rules were unnecessary when adopted and could not achieve their intended purposes.[78] The Staff recommended either drastic modification of the rules or complete repeal. The Staff explained:

> [O]ur analysis shows that the Commission's regulation of program supply has largely failed to achieve the Commission's stated objectives. The financial interest and syndication rules can only be characterized as misguided at best. . . . The rules have done little to further the Commission's goals of diversity or increased competition in the program supply market.[79]

Much of the Staff's argument is based on its view of the impact of new video alternatives such as cable:[80]

> The very appearance of new viewer options through an increase in the number of full-time networks, whether employing conventional or unconventional technology, mitigates the concerns expressed by the Commission in the promulgation of these rules. . . . Whatever "dominance" the three commercial networks possess in the network and syndication markets will automatically be reduced by the appearance of new networks.[81]

The Staff went on to assert that "the objective of the financial interest and syndication rules to reduce network market power would be attained by the simple fact of an increase in the number of networks."[82]

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76. FINAL REPORT, *supra* note 70, at IV-79-80.

77. *Id.*

78. *Id.*

79. *Id.*

80. Cable television systems distribute original and broadcast television programming over wired networks. Basic cable service refers to a package of cable channels which are provided to the consumer at a set fee. Pay cable refers to channels such as HBO and Showtime which, for an additional fee, provide recent theatrical movies and some original programming. *A Fifth Estate Glossary*, BROADCASTING, Jan. 3, 1983, at 75.

81. FINAL REPORT, *supra* note 70, at IV-84-85.

82. *Id.* at 85.

In recommending modification or repeal, the Staff also considered the feasibility of regulating individual contract terms between the networks and independent producers in order to control the networks' market power.[83] Such regulation, the Staff concluded, would not be advisable "[b]ecause a regulation of one or a few contract terms does not alter the number or identity of network firms, or the structure of the market within which they operate."[84] The Staff explained that, because of the existing three-network market structure, the bargaining position of the networks would enable them "to frustrate the regulation's compensatory purpose by altering other terms of the agreement to regain their advantage."[85]

In short, the Staff recommended regulation through deregulation by advocating the "eroding forces of competition rather than the ad hoc reactions of the FCC."[86] Such a recommendation, however, appears contradictory in light of the Staff's recognition of the continuing market power of the three national networks and their ability to circumvent possible FCC attempts at regulating contract terms.[87] While the Staff correctly concludes that the current three-network structure assures network dominance, it also appears to assert that the networks should be allowed to acquire even more power and financial strength.[88]

2. *Tentative Repeal of the Rules*

In June, 1982, the Commission proposed that the existing rules be repealed.[89] Among its major reasons for repeal was the argument, based on the findings of the FCC Network Inquiry Special Staff, that present market conditions and the emergence of new video technologies will provide sufficient competition for the networks and restrict the possibility of network dominance.[90] The FCC pointed to cable television,[91] over-the-air pay television,[92] video cassette and video disc players,[93]

83. *Id.* at 95.
84. *Id.*
85. *Id.*
86. *Id.* at 96.
87. *See supra* notes 83-85 and accompanying text.
88. *See supra* text accompanying note 79.
89. Notice of Proposed Rule Making, *supra* note 7, at paras. 32-42.
90. *Id.* at para. 38.
91. *See supra* note 80.
92. Also known as subscription television (STV), over the air pay television refers to the transmission of scrambled signals over the air to subscribers who pay a fee for a

and two emerging technologies, Multipoint Distribution Services (MDS)[94] and Direct Broadcasting Satellites (DBS),[95] as providing the networks' present and future competition.[96]

In addition, the Commission also took into consideration a three-year decline in network audience shares from eighty-eight percent in 1979 to eighty-one percent in 1981 and a drop in network income from $406.1 million in 1977 to $325.6 million in 1980.[97] In proposing repeal, the Commission enunciated its developing policy of regulation through deregulation and the val-

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signal decoder, which is attached to the subscriber's television set and allows unimpaired reception of the STV signal. *A Fifth Estate Glossary*, *supra* note 80, at 76.

93. A video cassette recorder (VCR) is "a TV attachment that can record programs off the air for later viewing, and play prerecorded video cassettes." *Glossary*, CHANNELS FIELD GUIDE '84, Nov.-Dec. 1983, at 67. A video disc player is a device, resembling a phonograph, which reads and displays images stored on special discs. "The images are encoded in microscopic 'pits,' which are embedded in the disc's surface and protected by a hard coating. A low-power laser beam is reflected onto those pits, and then interpreted, to produce a video image . . . . The laser provides an extremely high-quality image, and never wears the disc down, as a stylus would, by direct contact." *Optical Disc: A Technology in Search of A Niche*, CHANNELS FIELD GUIDE '84, Nov.-Dec. 1983, at 45. A major drawback of the video disc player is its inability to record programs. *Id.*

94. An MDS system uses omnidirectional microwave signals . . . to transmit video, or other services, to subscribers . . . . Although some hold hope that MDS will offer an alternative to cable TV, MDS suffers from obvious competitive disadvantages. First, MDS customer antennas must be within line-of-sight of the transmitter, a factor which can limit the number of customers an MDS service can reach. FCC rules also currently allocate only two MDS channels to a market—and in effect permit an individual operator to control only one of them—thereby limiting MDS operators to one-channel services.

A Fifth Estate Glossary, *supra* note 80, at 76.

95. A direct broadcasting satellite is a radio relay station which receives: video, audio, data and other transmissions from uplinks on the earth, then retransmits them to downlinks on the ground.

> Communications satellites are launched into positions 22,300 feet above the equator, where they orbit the earth at the same speed the earth is rotating, giving them the appearance of remaining stationary. . . .
>
> DBS satellites work basically the same way as the current generation of communications satellites—they receive signals from earth and retransmit them back to the ground. However, since they operate with higher power, their signals can be received with much smaller, and therefore much more affordable, earth stations.

Id. at 75. DBS thus allows the direct transmission of video signals from satellites to the viewer's home. *Id.*

96. Notice of Proposed Rule Making, *supra* note 7, at paras. 34-37.

97. *Id.* at para. 38. Recent reports indicate, however, that the networks are now enjoying healthy sales: "In what is being described as some of the most ferocious sales activity in recent years, both agency buyers and network sales people are reporting an unseasonably strong first quarter." *First Quarter TV Network Sales Off to a Roaring Start*, BROADCASTING, Jan. 16, 1984, at 41.

ues of "unfettered competition."[98] The Commission concluded:

> [T]he market for television programming has undergone significant change since adoption of the syndication and financial interest rule. Over the past few years, the rate of technological change in television program service has increased in a fashion which could not have been anticipated by us a decade ago. In addition, the pacer [sic] appears to be increasing with no peak in sight. Therefore, our concern over the abilities of the networks to act as monopsonists[99] in the purchase of television programming may no longer be justified.[100]

It is important to note that, while voting for the Commission's proposed repeal, Commissioners Rivera and Quello, in separate concurring statements, voiced their doubts as to the majority's view of the competitive impact of new video sources on the networks.[101]

On August 12, 1983, the Commission, after reviewing numerous comments and the oral testimony of interested parties, released its tentative decision to repeal the rules.[102] It did not finalize the decision but instead solicited additional comments on the action.[103]

The form of the tentative repeal departs slightly from the Commission's original proposal and has been labelled the "Fowler Compromise" by opponents.[104] In short, the FCC decided to eliminate the financial interest rule, thus allowing the networks "passive" financial interests in independently produced programs.[105] The Commission compromised, however, with respect to the syndication rule and decided to narrow the existing prohibition against network involvement in domestic

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98. Notice of Proposed Rule Making, *supra* note 7, at paras. 32-42.

99. Monopsony is "[a] condition of the market in which there is but one buyer for a particular commodity." BLACK'S LAW DICTIONARY 908 (5th ed. 1979).

100. Notice of Proposed Rule Making, *supra* note 7, at para. 32.

101. *Id.* at 32,967. For a further discussion of the commissioners' views, see generally *infra* notes 171-204 and accompanying text.

102. Tentative Decision, *supra* note 5.

103. *Id.* at para. 14.

104. *Networks Win Financial Interest, Syndication Battle*, *supra* note 10, at 28.

105. Tentative Decision, *supra* note 5, at para. 14. A "passive" financial interest is one which would not lead to active management or control. The Commission explained, "[I]t is not uncommon in the entertainment world to separate passive profit sharing interests from interests that involve active management control and we see no reason why a similar type of separation cannot be used effectively to further our objectives here." *Id.* Yet it appears that the Commission puts no limit on the financial interests networks can acquire. Thus, the use of the "passive" qualification appears to be merely precatory. *Id.*

syndication to include only prime-time entertainment series.[106] This compromise to modify rather than repeal the rules resulted primarily from pressure by independent television stations. They feared that if networks could control syndication of off-network prime-time series "reruns," the life blood of the independent station, then the networks could restrict the independents' access to popular shows, a practice known as "warehousing." Such action might allow the networks to circumvent the increasingly damaging competition offered by the independents.[107]

The tentative repeal of the rules also included a "sunset" provision which would become effective in 1990 and would eliminate the remaining restrictions on network participation in syndication.[108] Commissioners Quello and Rivera again issued separate statements in response to the majority decision.[109] Quello expressed a concern for the continued health of independent television stations and solicited comments on this issue.[110] Rivera dissented to the 1990 "sunset" provision, calling it "nothing more than a 'guesstimate' of future competition" in the video industry.[111]

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106. *Id.* at para. 203. Pursuant to the tentative decision, the Commission explained:

> [A] network will be required, within six months of a series completing its network exhibition run, to transfer all rights in that series it may hold relating to its syndication, to an unaffiliated syndicator. In addition, no later than the end of the fifth year of a network series run, the network will have to transfer all syndication rights for programs in that series to an unaffiliated syndicator.

Id. at para. 204.

107. *Id.* at para. 203. Opponents of the tentative repeal claim that even with the modification, warehousing is still possible. Under the modification, the networks

> would be permitted to enter the first-run syndication business and to syndicate non-prime-time programs, "mini-series" and made-for-television and theatrical movies; and, they would be permitted to take unlimited financial interests in programs produced by others with only precatory admonitions as to the exercise of power that possession of such interests confers. Most importantly, the networks would be permitted to choose the syndicator of even those programs which they may not syndicate themselves, while continuing to hold controlling financial interests in those programs.

Comments of the Association of Independent Television Stations, Inc. on Tentative Decision 25-26 (Sept. 20, 1983).

108. Tentative Decision, *supra* note 5, at para. 209.

109. *Id.* at 38,053.

110. *Id.*

111. *Id.*

III
The Present Video Marketplace and the Paradox of Deregulation

As noted above, the networks have suffered somewhat from the competition of such video sources as cable television.[112] They argue that as a result of this competition, their audience share and their program purchasing power—their ability to bid competitively for new programs—have been eroded.[113] Both the Network Inquiry Special Staff and the FCC accepted this assertion in their respective proposals for repeal of the rules.[114]

Nevertheless, the competition presently offered by new video technologies is not sufficient to counter the dominance of the networks.[115] Repeal of the rules in the context of the present and projected television marketplace would therefore achieve a paradoxical result in allowing the networks to solidify their position as dominant participants in the home entertainment industry, while at the same time weakening the power of independent producers who have served as a partial check to network dominance.[116] To illustrate this paradox, it is

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112. *See supra* note 81 and accompanying text.

113. CBS Comments, *supra* note 61, at 113. *In re* Amendment of 47 C.F.R. § 73.658(j), The Syndication and Financial Interest Rule, Reply Comment of CBS, Inc. in BC Docket No. 82-345, at Vol. I, A-3 (Apr. 26, 1983). [hereinafter cited as CBS Reply Comments].

114. *See supra* notes 70-111 and accompanying text. The FCC asserted:

> [C]ompetitors have made significant inroads into the broadcast networks' position . . . . [T]he growth of these other services has eroded the networks' share of the video audience to 80 percent. Even more telling is the decline in the proportion of video product purchased by the networks . . . which has fallen from 74 percent to 54 percent since adoption of the rules. The purchasing power of the other video media has, thus, grown substantially.

Tentative Decision, *supra* note 5, at para. 179. The CPD challenged the FCC's use of the above statistics, which were formulated by CBS, concerning the proportion of video product purchased by the networks. The CPD claimed that although only prime-time programs are at a issue, CBS, in its analysis, failed to subtract certain nonprime-time programming expenditures including those for theatrical movies, sports events and specials. Thus, the CPD concluded that "the vast majority of expenditures for the programs at issue here are by the networks . . . [and the situation] is not likely to change in the near future." Comments of the CPD on the Tentative Decision 83 (Sept. 20, 1983).

115. CPD Reply Comments, *supra* note 8, at 20-32. *See also* Brown, *Perspective: Beyond Boom & Bust*, CHANNELS FIELD GUIDE '84, Nov.-Dec. 1983, at 5.

116. In a speech before the National Press Club, independent producer Norman Lear discussed the continuing battle between independent producers and the networks. Lear outlined some of the problems he encountered in the production of "All in the Family:" "[The networks] fought my doing stories on the subjects of homosexuality, Vietnam, the Jewish Defense League, impotence, dozens of others — and they

necessary to analyze individually the impact of several video competitors on the networks' hold of the home entertainment industry and to consider the future of the video marketplace in light of the eventual emergence of new competitors.

A. Cable Television

One of the networks' more successful competitors in recent years has been the cable television industry.[117] While it is true that over the last twelve years cable television has made dramatic advances, cable has not drawn a substantial audience away from the networks.[118] The CPD reports that "as of February 1983, cable passed less than 60 percent of all television homes and was connected in less than 35 percent of all television homes."[119] In addition, only twenty percent, approximately, of television homes subscribe to a pay cable service.[120] Network television executives in fact admit that ratings on cable are not yet sufficient to alter their programming decisions.[121]

Although the cable television industry will continue to grow,

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flatly refused to have us photograph Archie Bunker diapering his infant grandson. Frontal nudity, they called it." Address by Norman Lear, National Press Club 9 (Sept. 21, 1983). Lear concluded that there is a "need for this battle to continue . . . . [D]iminish the effect and the strength of the independent writer/creator and the battle is over. It is in the public interest that that battle *never* be over." *Id.* at 33.

117. In 1970, there were only 2,490 cable systems which were connected to nine million homes. In 1983, 4,825 cable systems provided service to 45 million homes. Tentative Decision, *supra* note 5, at para. 111. The FCC reports:

> [A] wide variety of cable networks has come into being since the mid-1970's. Many of these networks are highly specialized, offering only news, sports, children's or cultural programs. Of the 34 basic service networks, 23 are advertiser-supported, including 3 independent stations, WTBS, WGN and WOR, which are distributed nationally via satellite and cable and often called superstations. Another 11 networks are supported directly or indirectly by subscriber fees. Cable systems also carry pay-cable channels in addition to the basic programming. The 17 currently available pay networks include movie channels, adult entertainment and regional sports channels. The largest pay cable networks are HBO and Showtime, which began principally as movie channels but have expanded their offerings to include original programming.

Id. at para. 113. *See also* CBS Comments, *supra* note 61, at 53-71.

118. In 1981, cable-originated and pay-cable programming accumulated only a 3.3% average audience prime time share of composite television households. The network share was 81%. CPD Comments, *supra* note 4, at 63 (citing Nielsen Cable TV Index, Nov. 1981).

119. CPD Reply Comments, *supra* note 8, at 22 (citing Communications Daily, Apr. 6, 1983, at 5).

120. *Id.* at 22-23 (citing CABLEVISION, Apr. 4, 1983, at 143).

121. *Id.* at 23.

the future video marketplace is likely to be quite similar to that which exists today.[122] As the CPD explains, "In 1990, fully 40 percent or more of the population will not subscribe to any new media, including cable."[123] In addition, "[p]ay cable will have an audience share of under 10 percent in 1990."[124]

The networks assert that cable television is now a serious competitor in the television industry.[125] In their analysis, they point to the tremendous growth in the number of cable systems and the increase in cable revenues.[126] CBS, for example, provided graphs illustrating the geometric gains which cable has enjoyed.[127] Yet, CBS's analysis fails to mention an important consideration: before 1970, cable systems were virtually nonexistent.[128] Thus, the recent growth of cable systems, when plotted on a graph, will reflect an impressive rising slope. CBS and the other networks do not emphasize cable's comparatively low ratings in light of the networks' approximately eighty percent audience share.[129] As a result, consideration of the admittedly rapid emergence of cable as a serious competitor to network television is both inappropriate and premature.

B. New Video Technologies As Competitors

CBS contends that certain other existing or developing technologies provide or will provide serious competition for the three networks.[130] Included among these competitors are MDS,[131] Low Power Television (LPTV),[132] DBS,[133] Subscrip-

122. *Id.*

123. *Id.*

124. *Id.*

125. CBS Comments, *supra* note 61, at 53-71.

126. CBS reports that basic cable revenues have climbed from $878 million in 1975 to $2.58 billion in 1982. CBS Comments, *supra* note 61, at 61. Pay cable revenues rose from $41.1 million in 1976 to $1.739 billion in 1982. *Id.* at 66.

127. *Id.* at 62-63, 67.

128. Originally, cable systems were used to bring regular broadcast services to rural areas which could not be reached by the standard broadcast signal. Demand for cable services accelerated only after Time, Inc.'s Home Box Office (HBO) leased a channel on RCA's Satcom 1 (satellite) in order to distribute pay-cable programming. *A Fifth Estate Glossary*, *supra* note 80, at 75.

129. *See supra* note 118.

130. CBS Comments, *supra* note 61, at 72-94.

131. *See supra* note 94.

132. LPTV refers to low-power television stations that previously were only used for the retransmission of full-power signals in rural or remote areas which could not receive the full-power signals directly. The role of LPTV has recently been "expanded to include program origination and sale of advertising or subscription services." CBS Comments, *supra* note 61, at 85.

tion Television (STV),[134] Satellite Master Antenna Television (SMATV),[135] video cassette players, and video disc players.[136] At present, however, the impact of these new media as network competitors is minimal.[137] In fact, systems such as DBS will not be operational until 1986.[138] As far as the other new entrants outlined by CBS are concerned, MDS is now available to less than one percent of the public; STV, available only in about twenty markets, is generally unprofitable; and LPTV is still in its infancy stage.[139] In addition, only 2.1 million homes, or 2.6% of all households, have video cassette players, and only 300,000 households have video disc players.[140]

Clearly, the competitive effect of these new media alternatives is minimal, and any effects of future systems are purely speculative. In fact, many new media have proven to be business failures in the face of network competition.[141]

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133. *See supra* note 95.

134. *See supra* note 92.

135. Satellite Master Antenna Systems (SMATV) . . . [are] cloned from cable systems, look like cable systems, and in most cases, are operated like them. The essential difference is that SMATV systems operate on private property—apartment buildings, condominium complexes, or even private housing developments and mobile home parks. Instead of getting a franchise (the right to string or bury wire along city streets and rights of way) from local governments, SMATV operators sign contracts with the property owners, allowing them to bring cable television into the homes on the property.

> In most cases, that's done by hooking up an earth station aimed at Satcom III-R—the RCA Americom satellite carrying the bulk of cable programming—to a multi-unit building's master antenna . . . . One advantage SMATV operators have over their cable counterparts is that they are free from regulation. Because they don't need a municipal franchise, they aren't burdened with the local regulations that accompany a municipal grant.

A Fifth Estate Glossary, *supra* note 80, at 76.

136. *See supra* note 93.

137. CPD Reply Comments, *supra* note 8, at 24.

138. *Id.* at 24-25.

139. *Id.*

140. Tentative Decision, *supra* note 5, at para. 116.

141. CPD Reply Comments, *supra* note 8, at 26. The STV industry, in particular, is experiencing great difficulties. Although at one time STV boasted 1.5 million subscribers, the industry has since lost 400,000 subscribers, and nine STV stations have shut down. Major STV companies have posted substantial losses. United Cable, for example, which owned three STV stations, wrote them off as a $33 million loss and put them up for sale. Peter Falco of Merrill Lynch stated that "STV is bordering on comatose." Talen, *STV: Going, Going* . . . . CHANNELS FIELD GUIDE '84, Nov.-Dec. 1983, at 33. MDS is not faring much better than STV. The number of MDS subscribers reportedly has "stagnated" at 500,000. *STV, MDS Industries Reassess Market Position at Joint Convention*, BROADCASTING, Nov. 7, 1983, at 68. Cable television, perhaps the most viable network competitor, is also struggling to stay profitable. Warner Amex Cable, a major

C. Network Investment in New Media

A major paradox of the current controversy over the rules is the fact that while the networks argue that competition from emerging media sources is eroding or will erode their audience share and purchasing power, each network has, at the same time, invested heavily in such new technology.[142]

The CPD outlined certain examples of the networks' participation in new technology.[143] For example, ABC was involved as a partner in the ill-fated American Repertory Television Service (ARTS), a cable television service.[144] ABC and Sony plan to distribute subscription television programs designed to be recorded on VCRs[145] during late night hours.[146] ABC is involved in other cable services including the Satellite News Channel and a "pay-per-view" sports channel called RSVP.[147] In addition, ABC is now marketing programs for video cassettes, video discs, and cable services.[148]

CBS involvement in new media is expanding as well.[149] For example, the network plans to launch a DBS[150] service and is a partner with AT&T in the developing videotext[151] market. In cooperation with Home Box Office, Inc. (HBO), a chief cable television rival, and Columbia Pictures, CBS plans to produce and distribute programming for pay-cable systems.[152] CBS is also involved in the development of MDS[153] facilities and manufactures video discs.[154]

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cable company, posted a $47 million loss in 1982. Stoller, *Cable Industry: End of the Gold Rush*, CHANNELS FIELD GUIDE '84, Nov.-Dec. 1983, at 26.

142. CPD Reply Comments, *supra* note 8, at 29.

143. *Id.* at 29-32.

144. *Id.* at 29-30.

145. *See supra* note 93.

146. CPD Reply Comments, *supra* note 8, at 30.

147. *Id.*

148. *Id.*

149. *Id.* at 30-31.

150. *See supra* note 95.

151. Videotext is a two-way interactive service that uses either two-way cable or telephone lines to connect a central computer to a television screen thereby permitting a user to retrieve all sorts of information and to conduct actual transactions. . . .

> Although videotext promises to be more expensive than teletext—and therefore may not be as widely used as teletext—its interactive capability would seem to make it the service of first choice.

A Fifth Estate Glossary, *supra* note 80, at 76. *See also infra* note 181.

152. CPD Reply Comments, *supra* note 8, at 31.

153. *See supra* note 94.

154. CPD Reply Comments, *supra* note 8, at 31. *See supra* note 93.

RCA, the parent corporation of NBC, produces video discs and video disc players and also plans to start a DBS service.[155] RCA's involvement extends into the videotext[156] market, and its satellites[157] now deliver "most satellite-distributed programming to cable, SMATV[158] and MDS[159] systems."[160]

Although the competitive impact of new technology is not yet significant,[161] the CPD correctly observes that "[i]f and when the new media become competitive with the networks for audiences, series programming and advertising revenue, the networks, through their increasingly significant holdings in the new technology, can only gain, not lose."[162]

D. Independent Television Stations

Both sides to the present controversy agree that independent television stations, i.e., over-the-air broadcast facilities which are not affiliated with one of the three major networks, have flourished during the last decade.[163] The number of independent stations has risen from seventy-seven in 1970, to 179 in 1982.[164] The parties do not, however, agree on the reasons for the independents' success. CBS contends that such success is unrelated to the FCC rules and based primarily upon "the improved technical and economic performance of UHF stations vis-a-vis VHF stations."[165] CBS points out that eighty-five percent of the independent commercial television stations utilize the UHF band and thus have benefitted from such improved performance.[166] The CPD contends that the independents' success is based on their "free access to the most popular and recent off-network programs," the prime-time entertain-

155. CPD Reply Comments, *supra* note 8, at 31. *See supra* note 95.

156. *See supra* note 151.

157. *See supra* note 95.

158. *See supra* note 135.

159. *See supra* note 94.

160. CPD Reply Comments, *supra* note 8, at 31.

161. *See supra* note 118 and accompanying text.

162. CPD Reply Comments, *supra* note 8, at 32. *See also* Brown, *Are the Networks Dinosaurs?*, CHANNELS, June/July, at 26. Brown asserts that, "evidence is accumulating that the old business of network television—the business of webs, affiliates, and nightly schedules—is inexorably in decline. The old business, that beautiful business, is the dinosaur. The companies we call the networks, however, are well equipped to survive and flourish in the new environment." *Id.* at 57.

163. CBS Comments, *supra* note 61, at 72; CPD Comments, *supra* note 4, at 53.

164. CBS Comments, *supra* note 61, at 72.

165. *Id.*

166. *Id.* at 75.

ment series.[167]

Regardless of the reasons for the independents' success, the impact of independent television stations on the networks' audience share remains insubstantial. In 1982, network affiliates held a seventy-nine percent prime time share within the top twenty markets.[168] Independent stations held only an eleven percent share of the audience in these same markets.[169] The CPD explained that, while independents have nearly doubled their share of the total television revenues from 12.7 percent in 1970, to approximately 23.2 percent in 1982, "[t]his is not to imply that independent stations are overtaking network affiliates in viewership, revenues or profits."[170]

IV
The Road to 1990[171]

Although the networks argue that new technology now offers serious competition, audience-share projections for the year 1990 undertaken by the networks predict that they will maintain audience shares as high as seventy percent.[172] CBS contends that "audience share data do not provide a valid measurement of the relative strength of the networks."[173]

167. CPD Comments, *supra* note 4, at 56-58.

168. *Id.* at 59 (citing Nielsen Source Index Feb. 1979 and Feb. 1982).

169. *Id.*

170. *Id.* at 58. Based on the success of independent television stations, CBS contends that the structure of the television industry was not "frozen" by the FCC's 1952 allocation and that a fourth network is still possible. To illustrate this point, CBS outlines Metromedia Inc.'s plans to establish a network by joining its seven owned stations with other independent and network affiliated stations. At the heart of Metromedia's plans was the syndication of a 90-minute late night talk show called "Thicke of the Night" starring Alan Thicke. The show was designed to compete with the "Tonight Show" starring Johnny Carson, the established network standard. CBS quotes Metromedia President Robert Bennett as stating, "Alan Thicke is the beginning of the fourth network." CBS Reply Comments, *supra* note 113, at exhibit A-10. Considering the relatively poor showing of "Thicke of the Night" when pitted against Johnny Carson, it is evident that Alan Thicke may be the end of Metromedia's hopes for a fourth network as well. Although the show started off strongly in the ratings, its popularity was short-lived. *Syndicated Shakeout Follows November Sweeps*, BROADCASTING, Jan. 9, 1984, at 46. In fact, the show recently was cancelled.

171. "The Road to 1990" is also the title of a 1982 CBS/Broadcast Group report which is often cited by the CPD as evidence of the network's admission that network dominance will continue into 1990. The report predicts that the networks will hold a 1990 prime-time audience share of 70%, while pay cable will hold an 11% share. CPD Comments, *supra* note 4, at 74.

172. CBS Comments, *supra* note 61, at 115.

173. CBS Reply Comments, *supra* note 113, at A-5.

What is important, the network argues, is the relative purchasing power of the networks, their ability to bid for new programs.[174] The CPD points out, however, that new media do not compete with the networks to obtain "prime time quality series programming" and that "very few of the services offering programming to cable systems are even considering the purchase of the types of series which networks routinely purchase."[175] In addition, services which do consider purchasing such programs are still unable to offer the amount of money which the networks are willing to pay.[176]

The CPD explains that another reason prevents program producers from looking to new media as prospective program purchasers: "Series attain value in the syndication market only through network exposure. Programs exhibited on pay cable are seen by too few persons to create, through public familiarity, the kinds of syndication values which off-network shows possess."[177]

Although the networks express concerns about competition from new media in an attempt to lend support to arguments in favor of repeal,[178] in other forums, the networks appear confident that their dominance in the industry will last into the 1990's.[179] In their concurring statements to the FCC's 1982 *Notice of Proposed Rule Making*,[180] Commissioners Quello and Rivera commented on this apparent contradiction. Quello, for example, expressed a concern that "it may be too early to conclude that the technological inroads of cable, teletext,[181] low power TV,[182] MDS[183] and STV[184] have significantly diluted net-

174. *Id.* at A-6.

175. CPD Reply Comments, *supra* note 8, at 26.

176. *Id.* at 27.

177. *Id.*

178. *See supra* note 113 and accompanying text.

179. *See supra* note 171.

180. *Supra* note 7, at 32,967.

181. Teletext is a one-way electronic publishing service that can be transmitted over . . . a standard television signal or the full channel of a television station or cable television system . . . . Most teletext technologies permit users to access a broad variety of information—stock quotes, news headlines, horoscopes, classified ads—through the use of some sort of keypad. One advantage teletext has over traditional print media is that it can be updated at any time.

Although some cable operators are already offering teletext service commercially, broadcasters are only offering it experimentally, awaiting approval from the FCC.

A Fifth Estate Glossary, *supra* note 80, at 76.

182. *See supra* note 132.

work dominance."[185] Quello quotes the President of NBC as stating to NBC affiliates that commercial television networks "will remain the dominant communications medium of the future. . . . [T]he future is not passing us by. The future is ours to take."[186] The President of CBS is also quoted in a similar speech:

> I am increasingly convinced that there is less change on the horizon than most are predicting. That is a theme that may sound a little different [these days]. I suggest that [changes in the media universe] will be not as large, not as threatening and not as soon as most predict.[187]

Commissioner Rivera echoed Quello's concerns in his statement that, "[T]he mere existence of some additional competition for viewers does not mean that the dominant players no longer can exercise undue leverage in program procurement. . . . [T]he three networks are still the most pervasive television programming outlets; no other entity even approaches their audience levels or buying power."[188]

A. Independent Producers As an Economic and Political Force

The networks argue that one result of the rules has been a concentration of power and wealth in the hands of a few independent producers.[189] CBS contends that the number of producers supplying prime-time programming dropped from sixty to forty-one between 1968 and 1981.[190] Although CPD data suggests an increase in the number of producers as a result of the rules,[191] both sides agree that several individual producers

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183. *See supra* note 94.
184. *See supra* note 92.
185. Notice of Proposed Rule Making, *supra* note 7, at 32,967.
186. *Id.*
187. *Id.*
188. *Id.*
189. CBS Comments, *supra* note 61, at 146.

> The brunt of the burden that the rules create, moreover, must fall on the most risky programs and the most risky producers, both distorting the response of the program marketplace to viewer program preferences and increasing the concentration of network program supply.
>
> The rules clearly tend to increase barriers to entry [of the program production business] and favor larger over smaller producers.

Id.

190. *Id.* at 147. CBS actually cites the same data as the Network Inquiry Special Staff. *See also* BACKGROUND REPORTS, *supra* note 5, at 571.

191. The CPD claims the number of suppliers has increased from 61 in 1969-1970 to 67 in 1981-1982. Tentative Decision, *supra* note 5, at para. 140. The reason CBS and the

have become financially stronger since the rules' adoption.[192]

As demonstrated above, the FCC Special Staff recognized the ability of the networks, as a result of the existing market structure, to circumvent attempts at regulation despite the producers' strength.[193] Network bargaining power is also evident in the fact that producers, even under the rules, are still forced to give up much of their creative control over programs to the networks as a condition of exhibition.[194]

Based on these two observations, it is clear that the networks are able to maintain an overwhelming bargaining position even under the existing rules. Thus, the major success of the rules has not been in a dramatic decrease of network power, but in a dramatic increase in the power of the independent producer. The rules have led to the financial strength of a group of independent producers who serve as a check and balance against the networks' continuing dominance of the industry.[195] Instead of one strong voice, two now

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CPD reached different conclusions as to the concentration of the program supply marketplace is

> that each used a different definition of producer. CBS simply counted the number of entities who had contracted with a network for the production or delivery of a program. [The] CPD counted all those who had management and/or creative responsibility or a financial interest in the proceeds from first-run exhibition.

Id. at para. 141.

192. CPD Comments, *supra* note 4, at 67-68. *See generally* CBS Comments, *supra* note 61, at 142-56.

193. *See supra* notes 83-86.

194. The Caucus for Producers, Writers and Directors, a group which is also involved in the present controversy surrounding the rules, claims that the networks force producers to "violate their contracts with the craft unions with respect to creative control over a program" by requiring the transfer of much creative power to the networks. Tentative Decision, *supra* note 5, at para. 36. In fact, many independent producers apparently exercised more creative control over programs in 1966 than they do today. The following clauses from 1966 and 1983 ABC producer/network contracts demonstrate this observation:

> 1966: Producer shall have full creative control of all entertainment elements and the production of each film. We (ABC) shall have the right to consult with you with regard thereto, but the final decision shall be in you.
>
> . . . .
>
> 1983: ABC shall have approval of all major creative elements of the Movie-for-Television including, but not limited to: producer, director, cinematographer, script, cast, casting director, title, composer, screen credits and publicity relating to the Movie-for-Television issued by or under packagers' control and any substitutes for any of the foregoing.

O'Flaherty, *Who's to Design TV—Creators or Salesmen?*, San Francisco Chron., Aug. 22, 1983, at 34, col. 1.

195. *See supra* note 116 and accompanying text.

exist. Such a result is desirable in light of the general federal policy encouraging diversity and competition.

The strength of independent producers is nowhere more evident than in the nature and extent of the controversy surrounding the tentative repeal of the rules. Led by the CPD, independent producers and others have elevated the issue of repeal to national prominence.[196] Clearly, the financial strength of the independent production community has led to political strength and, as a result, has advanced the long-sought goal of diversity by assuring a multiplicity of forces within the home entertainment industry.

B. The Final Paradox

The FCC Chairman, Mark Fowler, appointed by President Reagan to spearhead a massive deregulation movement, is perhaps the chief proponent of repeal and regulation through deregulation.[197] Fowler claims, "[T]he American entrepreneurial spirit and the sense of adventure of our people are not dead. Rather, they've been subjugated by decades of heavy-handed and in some cases mindless government regulation. It seems to me that the more we get out of the way the better it gets."[198]

Despite Fowler's position, the consensus in the FCC, the Congress, and the Reagan administration has shifted to a position favoring continued retention of the rules.[199] President Reagan's declaration of support for a two-year retention of the

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196. Shales, *Fear & Lobbying in TV Land Over Profits & FCC Rules*, Wash. Post, Mar. 23, 1983, at B1, col. 1.

> [T]he battle being waged in Washington over the rules is among the most passionate and extravagant in the history of American enterprise, with the networks and their colossal power on one side, and the producers fighting, sometimes for their very economic lives, on the other. East (New York, where the network corporate headquarters are) is meeting West (Hollywood, where the producers are) the way Ali met Frazier.

Id.

197. *Networks Win Financial Interest, Syndication Battle*, *supra* note 10, at 28.

198. *Id.*

199. *Ganging Up on the Networks Re Fin-Syn*, *supra* note 11, at 31. The President's position was revealed to Congress in a letter from presidential aide Edwin Meese to Senator Pete Wilson (R-Cal.). In the letter, Meese explained:

> [T]he President has consistently favored government efforts to promote vigorous competition; however, he has determined in this instance, in light of changing market conditions in the television and program production industries, additional review of the consequences of repeal of the rule is necessary. . . . [T]he President has decided to support a two-year legislatively-mandated moratorium on any change in the syndication and financial interest rule. A two-year moratorium would allow us to give the issue further study

rules has effectively stalled the networks' and Fowler's campaign to finalize the tentative repeal.[200] In response to Reagan's declaration, the Department of Justice, at one time in favor of repeal, changed its position and now advocates retention.[201]

Facing mounting pressure as well as the threat of a legislative moratorium on any FCC attempts to finalize the tentative repeal, Chairman Fowler announced that the Commission would not take action on the repeal before May 10, 1984.[202] Fowler stated that his decision was based on the "expressed desire" to allow the networks and producers an opportunity to settle the controversy privately.[203]

Considering the President's connections with Hollywood and the production industry, it is not surprising that he would side with independent producers who advocate retention. What is surprising and a final paradox to the current controversy is that a President, who was elected on a platform committed to government deregulation, would, based on his experience and personal ties to the entertainment industry, contradict a basic tenet of his administration.[204]

> and monitor the future changes in the marketplace, while at the same time ensuring continuing healthy competition within the industry.

Id.

200. *Id.*

201. *Id.*

202. *Fowler Backs Down on Fin-Syn*, BROADCASTING, Nov. 21, 1983, at 26. In return for Fowler's self-imposed moratorium, key Senate members who had been considering legislative action on the issue, agreed not to resume such a consideration until March 15, 1984 "and not even then unless it appears that one of the sides [either the networks or producers] has negotiated 'in bad faith' or a final commission action is deemed 'unreasonable.'" *Id.* The legislative attempts at resolving the current controversy have been rather confusing. Representative Henry Waxman originally introduced a bill (H.R. 2250) providing for a five-year moratorium on any FCC action to finalize the tentative repeal. In order to accommodate speedy approval of the bill, Waxman agreed to amend it to provide for a six-month moratorium. The House Committee on Energy and Commerce promptly approved the bill. *Ganging Up on the Networks Re Fin-Syn*, *supra* note 11, at 31. H.R. 2250, in its amended form, was then passed by the full House. Waxman has since introduced another five-year moratorium bill (H.R. 4260). Meanwhile, in the Senate, an amendment was attached successfully to an approved supplemental appropriations bill prohibiting FCC action on the rules for six months. A bill introduced by Senator Pete Wilson (S. 1707), which was a companion bill to Waxman's original H.R. 2250 calling for a five-year moratorium, is still pending. *Id.*

203. *Fowler Backs Down on Fin-Syn*, *supra* note 202, at 26. The negotiations have since failed to produce any compromise agreement. Each of the networks, in turn, walked away from the negotiating table, leaving resolution of the issues to the Congress or the FCC. *CBS Ends Talks In Bid to Share in Rerun Millions*, San Francisco Chron., Feb. 14, 1984, at 2, col. 3.

204. A report released by the House Oversight Subcommittee of the House Energy and Commerce Committee criticized Reagan's action stating that it amounted to an

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Conclusion

Those who advocate repeal of the financial interest and syndication rules contend that competitive forces rather than government intervention should dictate the structure of the television industry. Such an analysis, however, assumes that a competitively structured and unrestrained marketplace already exists. In its 1952 spectrum allocation, the FCC assured the survival of only three national networks. Thus, a major assumption underlying the free-market approach to regulation is lacking. Even in the absence of government intervention, the market will remain artificially constrained.

Proponents of repeal also point to new video sources as offering serious competition for the networks. Nevertheless, as demonstrated above, new media sources, such as cable, have yet to weaken the position of the three national television networks. Because network dominance is not effectively challenged by new media alternatives, repeal of the rules would lead to the paradoxical result of a less diverse television industry. The networks would be able to acquire even more financial strength through participation in syndication and ownership, however passive, of financial interests in independently produced programs. Such financial strength would be acquired at the expense of independent producers who might be forced to cede syndication and financial interests as a condition precedent to the exhibition of their programs.

Admittedly, the financial interest and syndication rules have not served to decrease the power of the national networks. Yet the rules have succeeded in expanding the power of another force in the industry: the independent producers. Through involvement in the syndication business and the ability to maintain complete financial ownership of programs, independent producers have grown into an economic and political force. The existence of these independent producers, who often act

improper intervention into the FCC's rulemaking process. The committee focused on a private meeting between Chairman Fowler and President Reagan on September 28, 1983, six weeks before Fowler imposed a six-month moratorium on any FCC action to finalize the tentative repeal. The report asserted that the President's action "was particularly unwise given the president's personal interest and the financial interest of his friends in the rule-making proceedings." Both Fowler and the Reagan administration deny any impropriety. *Reagan Chided For FCC 'Intervention,'* San Francisco Chron., Feb. 4, 1984, at 1, col. 5.

as a counterbalance to the networks' dominance, thus fosters the long-sought goal of diversity.

In their negotiations with the networks, the producers appeared willing to allow the networks to participate in syndication or acquire partial financial ownership of programs in exchange for a share in the advertising revenues generated by such programs.[205] Although the networks refused to relinquish any advertising revenues, such a compromise would have achieved many of the results sought by the FCC. The power of the independent producer would be maintained through continued financial strength, yet the networks would be allowed to enter the syndication business and acquire a financial stake in independently produced programs.

The failure of the networks and producers to reach a negotiated settlement suggests that the FCC or Congress may step in to resolve the dispute. It is unlikely, however, that Congress will allow the FCC to finalize the tentative repeal. The substantial impact of President Reagan's declaration of support for retention of the rules combined with a Congressional consensus also favoring retention support this projection. Although "deregulation" is now considered politically fashionable, Congress should continue to recognize the importance of the rules to the maintenance of diversity within television.

In order to assure diversity, it is necessary to maintain the existence of several countervailing forces within the industry. Critics argue that with each new season of programs, the television medium reaches new lows in baseness and tedium. Yet independent producers contend that without the rules the situation would be much worse. Producers point out that network executives are guided by "commercial imperative"[206] rather than by any sense of artistic achievement or cultural advancement. While independent producers are not blind to the profit potential of television, they are more apt to attempt to diversify programming by recognizing the medium's ability to educate as well as entertain.

Considering the overwhelming power of television to shape the attitudes and structural make-up of society, it is essential that programming decisions be guided by something more

205. *Clean Slate Time in Fin-Syn Talks*, BROADCASTING, Dec. 19, 1983, at 42.
206. *See* Address by Norman Lear, *supra* note 116, at 6.

than the "commercial imperative." Therefore, absent any network/producer compromise, the present rules should be left intact. Until new media sources are able to offer serious competition for the national networks, diversity will be encouraged only by the continued existence of more than one economic and political force in the home entertainment industry.